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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 158.

JOHN B. REYNOLDS, AS SOLE EXECUTOR OF THE LAST WILL AND CODICIL OF LUCY FAYERWEATHER, DECEASED, APPELLANT,

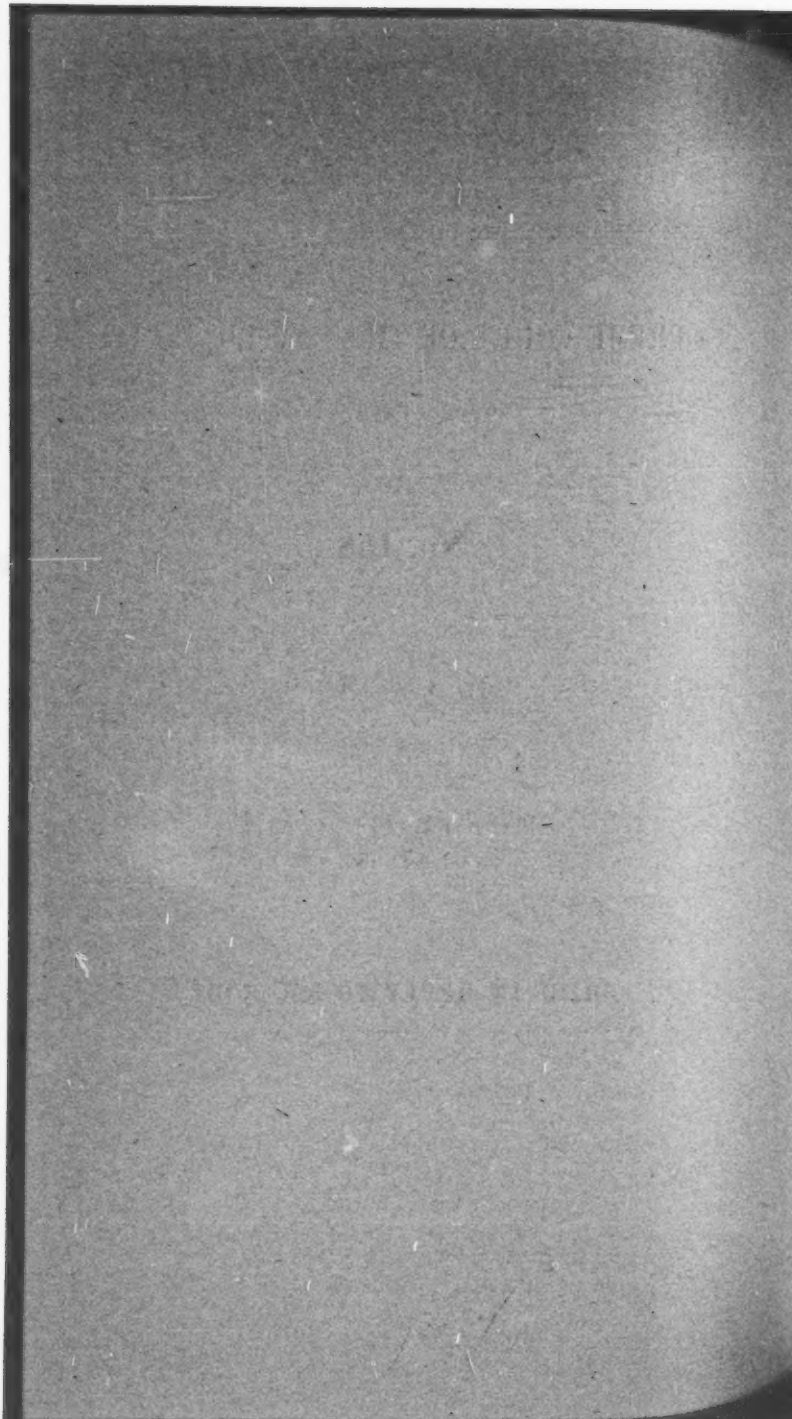
vs.

THOMAS G. RITCH ET AL., INDIVIDUALLY AND AS EXECUTORS, &C., AND OTHERS.

BRIEF IN REPLY TO MR. ROOT.

WILLIAM BLAIKIE,
Of Counsel for Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.



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In Equity.

JOHN B. REYNOLDS, AS SOLE EXECUTOR OF THE LAST WILL AND CODICIL OF LUCY FAYERWEATHER, DECEASED, APPELLANT,

vs.

THOMAS G. RITCH ET AL., INDIVIDUALLY AND AS EXECUTORS, &C., AND OTHERS.

BRIEF IN REPLY TO MR. ROOT.

I.

Is Mr. Root's Statement Correct?

In his closing argument Mr. Root made statements, which, unanswered, create an erroneous impression.

Certain of them refer to my part of the work before Mr. Sherman came into the case.

I took down these words in shorthand as they fell from Mr. Root's lips, namely:

> "*Every* ground, upon which it has been urged that the releases were obtained, * * * you will find in the complaint in Reynolds as Ex. *vs.* Ritch."

The title of the 20 colleges rests upon the dying-day codicil, that of November 15, 1890.

Only it named Ritch, Bulkley, *and Vaughan* as executors, and as absolute residuary legatees.

This is *uncontradicted.*

As it is that the *fourth* or "burned" codicil of but four days before, November 11, 1890, gave the residue less further personal bequests, NOT to said 3 men at all:

But *on its face, to the twenty colleges*—as in the will. Hence was void as to one-half of the net estate.

Surrogate Ransom held said dying-day codicil to be valid.

NOT upon a probate *contest*, but upon PART OF one—the *other* part being shut off by the *withdrawal* of the objections of the widow and next of kin:

Obtained in the manner already seen, namely, by said three men *preventing* these ladies *from presenting* their FULL case to the surrogate.

Which is the most frequent way defined in U. S. *vs.* Throckmorton, 98 U. S., 65, followed oftenest in the "*admitted exception to*" the rule of *res adjudicata.*

The twenty colleges claim that by said last codicil, executed while Mr. Fayerweather WAS DYING, said three men were trustees of said residue *for said twenty colleges.*

Because of their promise, made before *its* execution:

But made before the execution of the *first* codicil.

Your honors will recall that Mr. Root said that Mr. Fayerweather had *a fixed*, never changing *intention*—though using changing *methods*—to give the residue to the twenty colleges.

Ex-Judge Choate, in his brief at general term, in Amherst *vs.* Ritch, after stating (p. 32) that the evidence

> "does NOT warrant (such) a fixed purpose and intention,"
>
> "or a promise * * * that the residue should be equally divided *among the 20*,"

continues thus:

> "But, however this might be, it became utterly immaterial,—so far as the question of the meaning and effect of the fourth" (fifth) "codicil executed on the 15th of November is concerned;
>
> *because*, by the execution of the codicil of the 11th of November, the *absolute* gift to Bulkley and Ritch WAS ENTIRELY REVOKED;
>
> and swept away;
>
> AND WITH IT ANY AGREEMENT, if there was one,—entered into between Bulkley and Vaughan on the one part:
>
> and Mr. Fayerweather on the other part;
>
> *as to what they should do with the estate*,—if it should ever come to them.
>
> IT NEVER DID COME TO THEM."

And he adds (p. 35):

> "The *precise* question now under discussion is,—NOT, what was the intention of the testator and the undertaking of the legatees under the *first* codicil,—made in December, 1884;
>
> But what was the intention of the testator and the undertaking of the THREE" (NOT TWO, as before) "legatees, if any, in respect to THIS codicil of November 15, 1890?"

The uncontradicted proof is that upon the *morning* of November 15, 1890, less than three hours before the fifth codicil was made, the testator told Vaughan, in substance, that as to the residue *other* institutions would have to be found,

And that the residue would have to be given to *them*,

And *not to* the twenty colleges at all, save such of them as were among such "other" institutions.

That Vaughan so instructed at once had the last codicil prepared and executed.

Mr. Root himself brought out in the trial of Amherst *vs.* Ritch in 1894,

That until then, 1894, Vaughan *had suppressed* all reference to this morning talk, so far as it concerned said residue.

He does not deny *that he did not know of any* such talk *until then*—1894,

Or that the widow and next of kin,

Or that *their counsel* in the probate contest,—Messrs. Coudert and Rollins,

Or that I,

Never knew of it *until 1894*, nearly two years after the widow's death, July 16, 1892.

How came he then to tell you that "*every* ground, upon which it has been waged, that the releases were obtained * * * you will find in the complaint in Reynolds *vs.* Ritch"?

That complaint was sworn to December 6th, 1892.

I drew it before that.

How could I have put in it in 1892 *that which he, these ladies, Messrs. Coudert and Rollins, or I did not know of until Vaughan disclosed it in 1894?*

If it *is* in that complaint, it will be easy for him to show *where* it is in it.

As he CANNOT do so, why should he not either withdraw this statement;

Or explain to you why by it, he is not *misleading* you?

This representation of his to you is either true or false.

If it is *false*, why is he not asking you to keep the property of these ladies from them by a *false* representation?

The great grounds upon which we urge that these releases were obtained are:

1. By suppression of the truths namely, by suppression of this *morning* talk and by suppression of Oa.

2. By misrepresentation, in said three men all swearing that they three owned said residue *absolutely*; when they knew that they did NOT OWN ONE CENT OF IT;

3. By threatening the widow with litigation that would outlast her, and that would eat up the entire estate;

4. By starving her into yielding to their demands;

5. By pretending to "give" her ten per cent.

When they—NOT she—knew all the time that the whole 100 per cent. WAS HER OWN.

If that agreement was not a *nudum pactum*, *what* agreement would be?

6. That the dying-day codicil *was never executed* by Daniel B. Fayerweather.

7. Undue influence at its execution.

8. Incapacity to make said codicil.

9. That the Surrogate's decrees *were obtained by fraud*, namely, by said three men preventing us from presenting to the surrogate our *full* case.

10. That the Truax judgment *was obtained by fraud*—by defendants prevailing upon Justice Truax *not* to consider or decide as to the validity of our releases.

Hence, NOT TO HEAR and DETERMINE our case.

It is now seen that instead of as he says:

> "*Every* ground upon which it has been urged that the releases were obtained * * * you will find in the complaint in Reynolds *vs.* Ritch."

You will *not* find there, the *chief* ground, namely; the hiding of the proof of our rights,

By Vaughan and Parsons;

Which *they* knew;

Which they also knew that these ladies and their counsel did *not* know.

And which they—*fiduciaries* buying our withdrawals of objections, and our general releases—a transaction *uberrimæ fidei—were bound to disclose to us*—

That they *concealed* these proofs from us.

And by that concealment, by the sworn misrepresentations of said three fiduciaries, and by their deed of gift, when they confess in it that they knew that they had no right to make it;

By their flat defiance of the rule as to their duty, laid down so clearly that a boy could understand it, in O'Conner *vs.* Gifford, 117 New York, by PECKHAM, J., that in ANY doubt as to what the trust *was*, which was impressed upon this residuary estate of $3,500,000 in their hands;

They should have asked,—*not* Parsons and Ritch,

But THE COURT to INSTRUCT them.

Then if disaster came

They would be free from blame.

By these things
And by *this* course, they got from the widow and next of kin over two and a half millions of dollars,
Which money SO gotten, Mr. Root is here now asking you to let his twenty colleges keep.

If it was dishonest to GET money in THAT way,
Is it honest to KEEP it?

Will Mr. Root point out to you wherein the words of Lord Chief Justice Wilmot in Bridgeman *vs.* Green, cited with approval by Lord Chancellor ELDON in Huguenin *vs.* Basely, 14 Vesey, Jr., are not sound; are not applicable to this residuary estate, which he is trying to keep yet longer from its owners?

The words are few,
But their meaning is plain,
"Let the hand receiving it be ever so chaste;
"YET,
"IF IT COMES THROUGH A POLLUTED CHANNEL, THE "OBLIGATION OF RESTITUTION WILL FOLLOW IT."

That "restitution" we respectfully ask now.

II.

As to Calling Justice Truax.

Mr. Root made much of our calling Justice Truax, to say if he had considered and decided the issue as to the validity.

We did this after Mr. Root had sworn unqualifiedly in the plea of Hamilton College that Justice Truax had considered and decided as to the validity, although Justice Truax swears that he had not.

After Parsons's clients had sworn in their affidavits before the United States Circuit Court of Appeals that they were told and believed that Justice Truax had decided that said releases were valid; though he swears that he had not;

After Mr. Bishop had urged upon Judge Wallace that Justice Truax made no intimation that he had not decided as to said validity;

After Mr. Root had stated to the New York Court of Appeals in effect that Justice Truax had considered and decided what he swears that he had not.

With such unhesitating statements that Justice Truax had done, what his opinion and decision impliedly but not explicitly said that he had not done—

What were we to do?

But one man knew whether he had considered and decided as to the validity of the releases or not.

Namely himself.

Upon Mr. Root's theory, if a man's life were at stake—and the only thing that would tell if he might live—was the oath of the trial-judge—

Mr. Root would say—

No matter how innocent he was,

Rather than have the truth come out by the judge telling it;

Let him die.

This seems harsh.

Why is it not unjust?

Un American?

And senseless as well?

Does not the spirit of our laws say, that, in the search for *truth*, no man's lips are sealed?

That in the Burr trial,—President Jefferson must testify quite as well as the humblest citizen?

Why should he not?

Is not the objection sentimental and not sound, or real?

This Court has often said when doubt exists as to what the trial judge did.

And why.

Look into his opinion.

Find the reasons.

Then we can act with intelligence.

What harm does that do?

The inconvenience to the judge himself is so rare;

That his sense of justice will at once say—

Call me!

I'll see fair play here.

Injustice shall not be done, merely because it causes me fancied—not real—inconvenience.

What other view could a just judge take?

57. Last Chance Min. Co. *vs.* Tyler Min. Co., 157 U. S., 690, Brewer, J.:

"In Legrand *vs.* Rixey's Admrs., 83 Va., 877, it appeared that the pleadings and judgment left a doubt as to the precise matter decided in reference to and opinion of the trial court for the purpose of making certain that which was otherwise uncertain was approved. We quote from the Supreme Court of Appeals. The trial judge filed with the papers in the cause his reasons for his decision, which the decree itself shows was done for the express purpose of explaining his decision. This being the case, the opinion becomes a part of the record and may be looked to, and is even more reliable to explain in doubtful cases what was in issue, and what was determined, than mere intrinsic evidence to the same end."

National Foundry Company, &c., *vs.* Oconto Water Supply Company, 183 U. S., 234, White, J.: "In order to correctly decide what was concluded by the decision of the Circuit Court of Appeals in the creditors' suit, and the final decree entered in such cause, it must be ascertained what were the issues therein presented for adjudication and what was decided thereon.

"It is elementary that if, from the decree in a cause, there be uncertainty as to what was really decided, resort may be had to the pleadings and to the opinion of the Court, in order to throw light upon the subject." Baker *vs.* Cummings, 181 U. S., 117; Last Chance Mining Co. *vs.* Tyler Mining Co., 157 U. S., 688.

If it is right to look at his *opinion*, to hear the truth.
And his opinion *is silent:*
And without knowing what he did, *wrong with triumph:*

Wherein is the difference *in principle* between looking at his reasons in his *opinion;*
And in his *oral* statement?

The fear that this will become common is as groundless as it is to say that judges *usually* refuse to try the *main* issue in the cause.
In your own great experience how often have you known of an instance of that?

And did not the end amply justify the means?
It showed that Mr. Root and the others who swore like him had sworn to what was false.
Which ought to prevail—such swearing or the truth?

Mr. Root's Defence of Ritch and Parsons.

Mr. Root urged that you ought not to consider reflections upon such men as Messrs. Parsons and Ritch.

With the sworn proofs of their part in one of the greatest schemes of *evasion* of the law, which has ever come to your knowledge;

Sworn to by themselves;

Until as one able lawyer put it

"I consider the Fayerweather's case one of the great scandals of the century."

When these men were defying the widow and next of kin,

And asking, as Mr. Root's client in another case of public interest;

One William M. Tweed—

Was asking,

"What are you going to do about it?"

And that client—by the way, in the very court house for which he and his got $13,000,000 when $3,000,000, would build it today—

Found out that courts of justice still exist in this land;

That

"The mills of God grind slowly,
But they grind exceeding small;
Though with patience stands He waiting,
With exactness grinds he all."

That the law is still

"A terror to evil doers,
But a praise to them that do well."

That in that very court house he was convicted and sentenced for life;

Why not look through this thin coat of whitewash, right at the sworn facts?

The undenied facts?

Mr. Root has come to the wrong place and before the wrong men to substitute loose hazy generalities for sworn, uncontradicted proofs.

He hopes to confine the disposition of this case to the State courts.

But before State courts can give A's property to B without pay there is, as Justice Peckham put it in—

A great United States "IF."

As was said in—

West *vs.* Louisiana, 194 U. S., 258, by Peckham, J.:

"If through its courts it (Louisiana) erred in deciding what the common law was; yet IF no fundamental and absolutely all-important right were thereby denied, he still had due process."

Allen *vs.* Georgia, 166 U. S., 140, Brown, J.:

"To justify our interference the course pursued must have deprived, or will of due process.

If the State supreme court has acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process.

"Plaintiff must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizens, to justify our interference."

Brown *vs.* N. J., 175 U. S., 175, by Brewer, J.:

A "State has full control of its court procedure *subject only* to the qualification that such procedure must not

work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution."

Bertholf *vs.* O'Reilly, 74 N. Y., 515, Andrews, J.:

"The taking of private property for a private purpose, under the guise of taxation, is no less a violation of the Constitution than if the property of A was attempted to be transferred to B by the mere force of a legislative enactment."

It is precisely one of those same "fundamental" rights that these ladies have been deprived of since the day that Daniel B. Fayerweather died,

Which rights they ask this great court to now restore to them.

To inform these men that property cannot yet be taken in this country in that way; that

"But in the course of time the laws of the land were corrupted;

"The weak were oppressed;

"And the mighty ruled with a rod of iron,"

does NOT apply to the United States.

That the men who, in times of utmost peril, declared, and backed their declarations with their lives,

That they had had enough of British oppression,

That first after the nation's existence, their purpose was

"To establish justice," and their next

"To ensure domestic tranquillity":

Have worthy successors in charge of this nation's highest interests to-day;

Men who can quickly see whether devouring widows' houses

At 10 cents on the dollar tends

"To ensure domestic tranquillity,"

And

"To establish justice."

And who do not hesitate a moment to say what they see.

The Girard will dealt chiefly with, if in the charter of but one institution, the Christian religion should be recognized.

The Vanderbilt will contest as to whether some members of but one family should have more or less;

The Fiske McGraw will contest, if Cornell university could take more than her charter said;

The Tilden will contest, if one city should have one more library;

The Stanford, if one university should have more or less.

But in this—the greatest will contest in the annals of American jurisprudence:

Not excepting the Gaines it is to be decided if our seats of learning, through no fault of theirs, but through misguided counsel, shall take and keep money that does not belong to them.

Money gotten? not by justice, but "by refined technicalities!"

By substituting form for substance;
By men "who strain at a gnat and swallow a camel,"

A megatherium rather.
An entire Noah's ark.

Who fancy that this great substance—court will not see through their gauze veil of protection—because the money goes "to charity,"

Forgetting that there is nothing new in such work; that "suppressio veri" *for charity* is nineteen hundred years old.

That Ananias and Sapphira found then that it would not work (Acts v : 1);

That the penalty was more severe than they had dreamed of;

That courts of justice ever since still regard it as not to be condoned for a moment.

That innocent women, ignorant of their rights, cannot be stripped of their own by any such methods.

That getting their property by hiding their rights and then whitewashing the hiders must today face the law as laid down in—

Gordon *vs.* Gordon, 3 Swanst., 467, Eldon, L. C.:

"Holding this to be a family agreement the court would not disturb it provided that there was honest dealing on both sides and each withheld the communication of no circumstance proper for the consideration of the other. * * *

"But in every case it has been said, and it would be monstrous to hold otherwise, that if what one knows has been concealed from the other who has been misled by that concealment the court would NOT sanction the agreement. * * * 473. In contracts of this sort FULL and COMPLETE communication of material circumstances is what the court *must insist.*"

That, as was said by Lord Esher, master of the rolls, upon his retirement from his long and valued service upon the bench (as quoted in the New York *Sun* of January 9, 1898),

When form and technicality tried to take the place of substance in his court:

"If any supposed rule of law is put forward which would "prevent the rule of right being applied:

"The supposed rule of law must be wrong;

"And if it ever be alleged that the law will prevent the "truth from being established; and oblige the court to say "that that is not true which is true—

"If ever any such rule of law is attempted to be put for-
"ward; it must be wrong;
"And I have always said so."

Or, as was said by this court in Mast, Foos & Co. *vs.* Stover Mfg. Co., 177 U. S., 489.

Brown, J.:

"The primary duty of every court is to dispose of cases according to the law and the facts."

In a word, to decide them right.

Should you now decline to sanction such work as that by which this residuary estate has thus been kept from its owners?

Mr. Root asks you to send it all back,

And spend years more in depleting the estate by contest in the courts below.

Until he shows that this court was in error in its decision in Kennedy *vs.* Creswell (101 U. S.), that his clients have no such rights;

That they have made their choice, and must stand by it;

That having a plea and answer to choose between,

They chose the plea;

That Kennedy *vs.* Creswell says that, what when a plea is found false;

There is judgment for complainants for the relief demanded in the bill,

Why should he have what the law allows to no one else?

While my colleague Mr. Sherman has presented the probate route;

and has asked you to say if you will set aside one will;

and will establish another;

It seems to me that you have pointed out a better way,

That, instead of blazing a path; of sapping and mining;

And extracting the stumps, and otherwise getting such a road ready for use; you have, over and over, pointed to, and used an asphalt pavement that reaches the same goal without disturbing the decree of any court, namely, by saying to the wrongdoer, as you did in Arrowsmith *vs.* Gleason, and in Marshall *vs.* Holmes: "Hand this property to its owners."

Mr. Root was sure that the bill did not say that the Traux judgment was obtained by fraud.

If he will look at the bill he will find that it characterizes it as "fraudulent."

Any dictionary of standing will tell him that one of the meanings of "fraudulent" is "obtained by fraud."

Worcester uses those very words, viz.

"Fraudulent.

Obtained by fraud."

As to the Record.

Mr. Root criticizes the arrangement of the record.

Vol. I contains the pleadings. Also the Hamilton proofs, as they were taken years before any other.

Vol. II, complainants' and cross-complainant's proofs.

Vol. III, defendant's proofs.

Vol. IV, exhibits, orders, opinions and miscellaneous matters, put in it by order of Judge Lacombe.

The separate index locates about everything in the record.

Had Mr. Root not been out of this case for the last five years, he would have known more about the record.

And about the case.

He was publicly reported, some months ago, as deprecating winning cases by technicality,

And, although he confessed to having once or oftener done so himself;

As urging that it was dangerous and indefensible.

At another time he was thus quoted in the N. Y. Tribune of June 28, 1904:

"The exercise of power not conferred by law may in a particular case destroy no man's property nor restrain his liberty; but it weakens the title to every man's property and injures every man's liberty, because it is one step in a process which, if continued, would be destructive of our free institutions."

Why is not that position sound?

Your Honors have seen that this contest narrows to "refined technicality" upon the one side and justice upon the other.

That the only State Court that could try this cause swears that it did not.

That the only Federal Court that ordinarily could try it, registers in its opinion that it is not giving *its* decision at all.

But one forced upon it by a higher power.

That, strange as the truth sometimes is—

In the fourteen years less one month since Daniel B. Fayerweather died, although there has been practically ceaseless effort to have justice done, no court of *original* jurisdiction has to this day tried and determined who owns this residue,

That such trial has been prevented by methods which find a more uncongenial atmosphere in this court-room than in any other place on earth,

When the day of reckoning has thus come.

When judgment, tardy as it has been, is now at last to be faced.

Why do not the words of the New York Court of Appeals apply here?

Greenwood *vs.* Marvin, 111 N. Y., 440. Ruger, Ch. J.:

"A proper regard for *justice* and *the decent administration of the law*, requires that a litigation, which has already raged for a quarter of a century, *over a question which the evidence seems to place beyond reasonable doubt*, should be decided *upon its merits;* and NOT diposed of ON A TECHNICAL POINT, which would remand the controversy to be begun anew, between parties who are all represented in this action, and whose rights can be effectually settled herein."

What evidence hints even that these withdrawals and these releases there was ever any consideration paid?

Even of ONE CENT?

Or that any court of original jurisdiction has to this day tried this case *on the merits?*

WHY the proofs of the rights of these ladies were concealed, is not the question here.

That they WERE concealed stands *unquestioned.*

As all defendants were served with the order to show cause why injunction should not issue;

And why this residue does not belong to the widow and next of kin;

And were so served June 29th, 1897;

Before this residue was paid to them.

All have taken it with notice—that they did not own it.

As prudent men, they should have acted accordingly.

We respectfully ask that it now be delivered to its owners. And for such other relief as may be equitable and just.

Respectfully submitted.

WILLIAM BLAIKIE,

Of Counsel for John B. Reynolds as Sole Executor of Will of Lucy Fayerweather, Deceased, Appellant.

OCTOBER 13, 1904.

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JAMES H. McKENNEY,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

EMMA S. FAYERWEATHER and MARY W. ACHTER, *Appellants*, vs. THOMAS G. RITCH ET AL., *Individually and as Executors, &c.*, AND OTHERS. } No. 514. 157

JOHN B. REYNOLDS, *as Sole Executor of the Last Will and Codicil of Lucy Fayerweather, Deceased, Appellant*, vs. THOMAS G. RITCH ET AL., *Individually and as Executors, &c.*, AND OTHERS. } No. 515. 158

AFFIDAVIT IN REPLY TO THOSE OF MESSRS. ROOT, STIMSON, PARSONS, AND BOVEE.

CITY OF WASHINGTON, *District of Columbia*, } ss:

William Blaikie, being duly sworn, says:

After the hearing this afternoon and *after* we had left the court-room, Mr. Bovee handed me a copy of the affidavit of Mr. Parsons; of that of Mr. Stimson; of his own, and of Mr. Root's.

Mr. Stimson says, page 4, that Mr. Parsons was not representing Hamilton.

No one says that he *was*.
That said executors' testimony was not *Hamilton's*.
No one says that it *was*.

That *one* copy would make it impossible for each Justice to have *constantly* before him the full record.
He omits to show any *need* of this.
Or any *reason* of weight why *one* copy will not suffice, as well as one *dictionary* would.

He fears that it would not protect *Hamilton's* rights.
But does not show *how* it would not.

Admits that Hamilton *did* stipulate that *one* copy of volume V be filed.
Does *not* deny that Mr. Root, as the record states, submitted volume V "as a SEPARATE volume."
Or that he used the words "ACCOMPANYING this testimony."

He says: "It is self-evident that the purpose was to use the printed copy instead of the originals. That it did not refer to any appeal. But Mr. Root's *words* are 'ACCOMPANYING,'" &c.

A dog *accompanies* his master. He is no *part* of him.

Hamilton served us with one copy of *her* record, *not* with *three* copies of Vol. V. But with *only one* copy.
One was enough, when *she* had to pay for printing it. She did not even do *that*—only a *small* fractional *part* of it—nearly *fifty* parties *dividing* that expense *then*.
Mr. Root wants *many* copies of Vol. V, in order to have it agreeable to counsel *now*—when *we* have to pay for it.
When *he* had to—and but for *one-fiftieth* of it, a "*separate* copy *accompanying*" this testimony, met *all* demands for all counsel.

How defendants *padded* this record—when if *they* had *to pay* for it, they simply had to draw upon this *estate;* but if *we* had to, we had from moderate means *to* do the best we could, will be seen from one or two samples of *their* work. Just why did they insist upon repeating a five-line objection *verbatim some one hundred and fifty times?* When we steadily asked if the words "Same objection" would not suffice; as *they* had taken the unique position that these colleges are not "*literary*" institutions, hence do not come under chapter 360 of the New York statutes of 1860. This compelled us to print 140 pages of the charters of said institutions. It will not take long to get through with *these blocks* of the record.

Messrs. Stimson, Bovee, and Parsons rest chiefly upon my words, "upon the stipulations of all solicitors," as to Judge Lacombe's order in this matter.

I used these words because I then understood Mr. Root's words "separate copy accompanying," &c., would make *one* copy suffice for Hamilton.

I knew also what Mr. Parsons had *stipulated*, upon the record, as to the three executors, and the proofs therein for *them*.

By the order of Judge Lacombe of May 16, 1902 (volume IV, page 657), *all* defendants adopted, either the *Hamilton* proofs, or the *executors'*, or some *a part* of one, and some of the *other*. I understood that adopting such record, adopted *the stipulations* with it. I also understood Mr. Sherman—who was *more* familiar with the stipulations than I—to say that they *had* so stipulated.

The order reads that Messrs. Stimson and Bovee appeared in opposition.

It, however, became *an order* of the Circuit Court of the United States, *binding upon them and theirs*, as well as upon

all other parties. Its meaning was plain. The purpose of such an *order* was that volume V *need not be printed;* but that *one* copy of it may be certified, attested, *or identified.*

As *no one has appealed from* this order, it appears to be *binding* upon *all* parties.

Mr. Bovee says that Justice Lacombe's order does not apply to volume VII.

But, as already seen in the moving papers, his *memorandum* does. There is no doubt how *he* views this printing a large number of copies in this instance.

Mr. Bovee devotes almost his entire page 5 to saying that volumes V, VI, and VII are an "*inseparable*" part of the return.

He omits to add to this *conclusion*, any *reason* why *one* copy of each will not do.

He does not say that counsel cannot do without them.

Or why, when Judge Lacombe, in the interest of economy of money and of bulk in record, provided that *all* could *extract, defendants* have *not* done so. In *a few pages* of such *extracts*, complainants and cross-complainant have covered *all they* want from said three books.

If any part has been overlooked, it can easily be put in our *briefs.*

Mr. Bovee nowhere says why *defendants* cannot *also* put said extracts in *their* briefs; or why a *large* number of the defendants do not join him in this application—he, Mr. Parsons, and Mr. Stimson, being *but three* of the *nineteen* solicitors for defendants in the present suit.

He says that volume VII has *other* papers than our briefs. He nowhere denies that *all* said *other* papers *are also in volumes I, II, III, or IV.*

My whole impression is that *Mr. Bovee himself* drew the Examiner's certificate (volume I, p. 2); that he said that he had no desire to lay additional burden upon us; that *then* we assented to said certificate just as *he* had drawn it.

Two words will cover Mr. Parsons' short affidavit.

He was sure that Judge Lacombe's order could not modify a rule of this court.

So was Judge *Lacombe.* But *he* was equally sure, and stated it in an unanswerable way, of what *he* would have done in *like* case if he had the power to.

If Mr. Parsons will look at TWO words upon page 2 of *his own* affidavit, he will see how they make the rest of it look.

They are "ANY" and "THAT."

They occur in *this* connection.

"By Mr. SHERMAN: I consent that the papers referred to "may be used upon the final hearing, and upon ANY "appeal herein, *without* incorporating them in the record "physically, *providing* the defendants make *like* stipulations "on their part. * * * "

Mr. PARSONS: " *We make* THAT *consent.*"

Explanation of the *meaning* of these two words is unnecessary.

Your Honor, the Chief, well asked today if you could not manage to get on with *four* volumes instead of *seven.*

I respectfully submit that you *can, better than* with seven, *provided* you use but *one* copy of the last three volumes, as you would of a cyclopædia or other book of reference.

No substantial ground has yet been shown to justify, for a moment, inflicting the grinding burden of nearly four thousand dollars *more* upon these appellants, to provide defendant's counsel each with a *seventh* copy of volume V, as *each has had*—as I am informed and believe—*six already.*

With copies of volume VI, which is *our*, not *their*, exhibit.

And *from* which we greatly doubt that they quote or refer to *one* word.

If you grant *this* motion, we would like, if the cause *is advanced*, as early a hearing after May 1st as is agreeable to Your Honors. It will still leave us the clerks' fees upon the first four volumes; which he has thoughtfully given us a reasonable time to meet.

If this motion is denied, then we respectfully ask that it be set down for an October date.

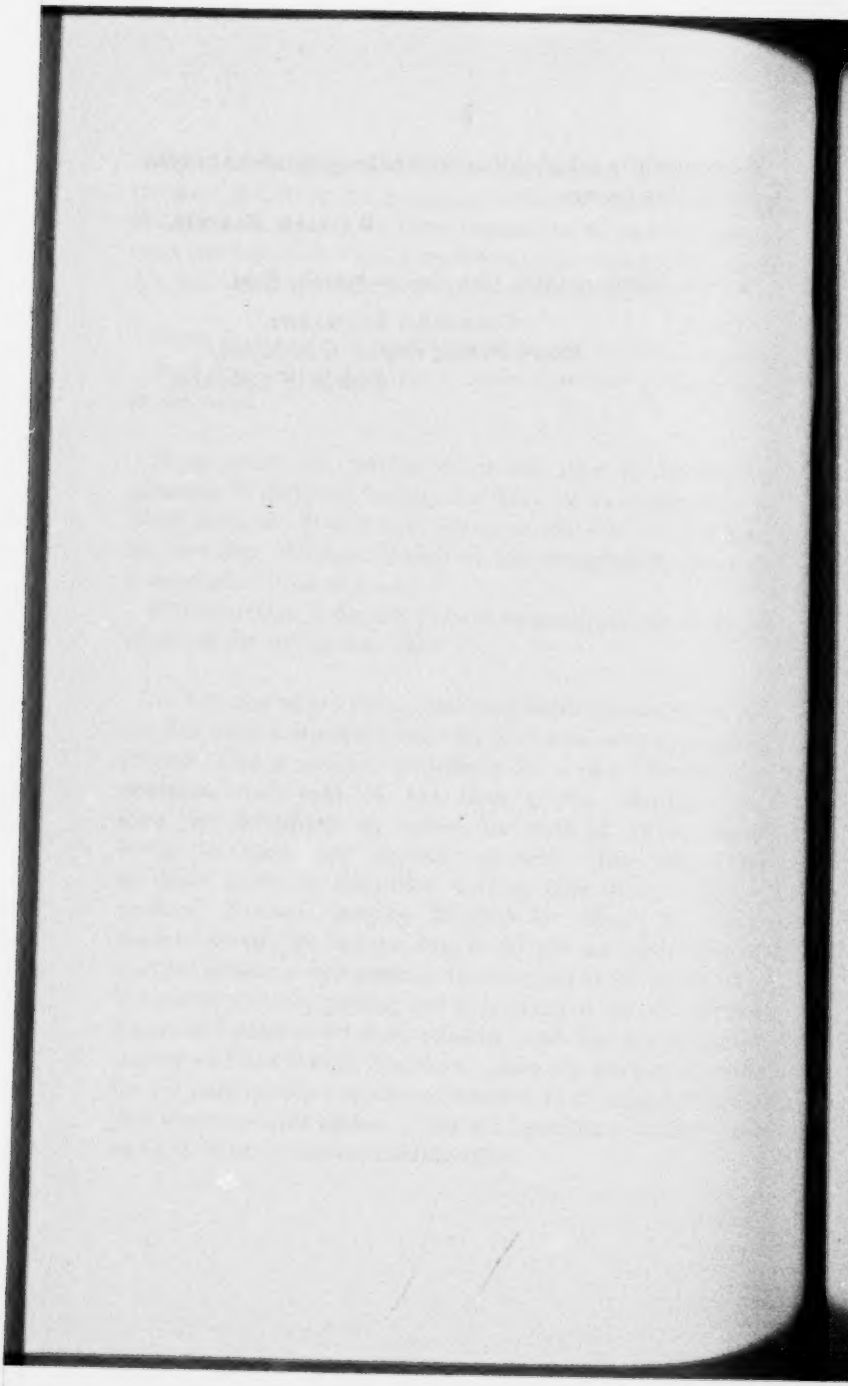
No line anywhere shows that this feeble opposition is not *the best* that defendants can do, under cover of a touching, though thinly veiled, solicitude for Your Honors' convenience, and that of *but three of the nineteen solicitors for defendants* to mulct us with a great outlay *really* to *block* our appeal; as with this vast estate to draw upon as they like, as *they have* drawn—Ritch's partner, Arnoux, getting $50,000 for about ten days' work of about five hours a day, or $1,000 an hour, for his part in obtaining the probate decrees; *not at all* by *winning* the contest, but by getting the objections of the widow and nieces withdrawn and their releases *in the fashion* so clearly put by ex-Chief Judge Andrews. Also Mr. Parsons $30,000, for his part in said probate transaction, *that* being only their *first* chance at this estate. This is a *small* item to *them;* but to *us*, it is one *of serious consideration.*

We respectfully ask that this motion be granted, as prayed in the moving papers.

WILLIAM BLAIKIE.

Sworn to before me this 15th day of March, 1904.

[SEAL.] CORNELIUS ECKHARDT,
Notary Public, City of Washington,
District of Columbia.



FILE COPY.

Office Supreme Court U. S.
FILED
MAR 18 1904
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Appellants,

vs.

THOMAS G. RITCH *et al.*, Individually and as Executors, &c., and Others.

No. 156 157.

JOHN B. REYNOLDS, as Sole Executor of the Last Will and Codicil of Lucy Fayerweather, deceased,
Appellant,

vs.

THOMAS G. RITCH *et al.*, Individually and as Executor, &c., And Others.

No. 156 158.

Supplemental affidavit for cross complainant.

City County and State of New York, ss.:

WILLIAM BLAIKIE, being duly sworn, says:

I desire to correct an error.
Namely, by striking out all of page two of my

affidavit of March 15th, 1904, after the word "Admits," upon the eleventh line.

In *her* record below, Hamilton filed *one* copy of Volume V; stipulated that it, a correct copy, was on file; then obtained an order that she need *not print, or serve*, volume V.

But that *one* copy would suffice (Vol. IV, page 619).

Mr. Root thus saved his client probably a good deal over a thousand dollars—a sensible and economical step, preserving the rights of all, and harming no one.

He and *not* the 19 other solicitors—but *only two* of them, now ask *us* to supply each with a *new* copy of Volume V—of which all have had several already.

And 19 to the Court—at a cost of from three to four thousand dollars—perhaps more.

When *his* client had to pay—he kept the expense *down*—which was *right*.

When *ours* have to—he suddenly finds it necessary to run it *up*, into thousands of dollars.

WILLIAM BLAIKIE.

Sworn to before me, this 16th
17 day of March, 1904.

GEORGE B. HAYES,
Notary Public,
New York County.

EVENING POST JOB PRINTING HOUSE, NEW YORK.

Office Supreme Court U. S.
FILED
MAR 14 1904
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1903.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Appellants,
AGAINST
THOMAS G. RITCH *et al.*, individually and as Executor, &c., and others.

No. ~~134~~ 157.

JOHN B. REYNOLDS, as sole Executor of the Last Will and Testament of Lucy Fayerweather, deceased,
Appellant,
AGAINST
THOMAS G. RITCH *et al.*, individually and as Executor, &c., and others.

No. ~~135~~ 158.

BRIEF FOR APPELLEES ON MOTION FOR PREFERENCE AND TO ADVANCE ABOVE CAUSES.

This is a motion on behalf of Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, individually and as executors of the last will and

codicils of Daniel B. Fayerweather, deceased, to prefer the above causes and advance the same upon the calendar.

Statement.

Daniel B. Fayerweather died November 15, 1890, leaving a last will and testament and four codicils.

Thomas G. Ritch, Henry B. Vaughan and Justus L. Bulkley were named as executors and trustees and residuary legatees.

Testator left him surviving his widow, Lucy Fayerweather, and Emma S. Fayerweather, Mary W. Achter and Lucy B. Beardsley, his three nieces, his only heirs at law and next of kin.

Objections to the probate of the will and codicils were filed by the said widow and next of kin. There was a contest before the Surrogate of the County of New York, resulting in a decree, admitting the will to probate on February 25, 1891, and a decree admitting the codicils to probate on the 24th of March, 1891. Thereafter the executors duly qualified and entered upon the performance of their duties.

By the terms of his will testator gave to the following named colleges the amount set opposite their respective names below:

Bowdoin College	$100,000
Dartmouth College	100,000
Williams College	100,000
Amherst College	100,000
Wesleyan University	100,000
Yale College	300,000
Columbia College	200,000
Union Theological Seminary	50,000
Hamilton College	100,000
University of Rochester	100,000
Cornell University	200,000
Lafayette College	50,000
Lincoln University	100,000
University of Virginia	100,000
Hampden University	100,000

Maryville College	$100,000
Marietta College	50,000
Adelbert College	50,000
Wabash College	50,000
Park College	50,000

By the terms of the last codicil the testator gave his residuary estate, being upwards of $3,000,000, to said Ritch, Bulkley and Vaughan.

In June, 1893, an action was begun in the Supreme Court in the State of New York by the Trustees of Amherst College and four of the twenty colleges above named, against said Ritch, Bulkley and Vaughan, in which action it was sought to obtain a judgment that the said twenty colleges were entitled to the entire residuary estate, notwithstanding the specific terms of the fourth codicil.

In this action, Mrs. Fayerweather having died, John B. Reynolds, as executor of her will (the plaintiff in the cross-bill herein), and Emma S. Fayerweather and Mary W. Achter, the complainants in the bill herein, were made parties defendant; and Lucy B. Beardsley, the other niece and heir at law of the testator, was also made a party defendant.

All of the twenty colleges above named were parties plaintiff or defendant.

After the will and codicils were admitted to probate, the residuary legatees Ritch, Bulkley and Vaughan made a deed of transfer of the residuary estate of the testator to a large number of colleges and hospitals specifically named in said deed. In said action all of said donees named in said deed were also made parties defendant.

There were before the Court as parties plaintiff or defendant every person who might by any possibility claim an interest in the residuary estate of Daniel B. Fayerweather.

Reynolds, as executor of Mrs. Fayerweather, the plaintiff in the cross-bill herein, appeared by William Blaikie, his attorney, and filed an answer.

The complainants Emma S. Fayerweather and Mary W. Achter duly appeared by Edward C. James, their attorney, and filed an answer.

The twenty colleges above named appeared by respective counsel and claimed the residuary estate by reason of a secret trust in the executors.

The donees named in the Bulkley, Ritch and Vaughn deed appeared by counsel and claimed the residuary estate by virtue of deed to them.

The case came to trial in the Supreme Court. That Court having jurisdiction of all the parties and the subject matter of the action. Judgment was rendered in favor of the twenty colleges above named, including the plaintiffs in the case of Amherst *vs.* Ritch.

Upon the trial of the action the plaintiffs herein, Fayerweather and Achter, and Reynolds as executor of Mrs. Fayerweather appeared by counsel and submitted evidence. The judgment determined that the twenty colleges above named were entitled to the residuary estate, and that the widow's executor and next of kin were not entitled to any part thereof.

Reynolds, as executor of Mrs. Fayerweather, and Emma S. Fayerweather and Mary W. Achter appealed to the General Term of the Supreme Court. The judgment was affirmed.

They further appealed to the Court of Appeals of the State of New York. The judgment was affirmed.

The remittitur of the Court of Appeals was made the judgment of the Supreme Court, by order of Supreme Court dated March 10, 1897, and final judgment was duly entered in July, 1897, directing the executors Ritch, Bulkley and Vaughan to divide the residuary estate among the twenty colleges above named.

In June, 1897, the complainants Fayerweather and Achter began this action in this Court, making defendants Reynolds, as executor of Mrs. Fayerweather, Bulkley, Ritch and Vaughan, individually

and as executors of Daniel B. Fayerweather, the twenty colleges above named, and others.

In the bill of complaint the complainants attack the probate decrees of the Surrogate's Court of New York County and the decree of the Supreme Court in the case of Amherst *vs.* Ritch, and seek to set aside the same and to obtain a judgment directing that said Reynolds, as executor of Mrs. Fayerweather, and the next of kin of Mrs. Fayerweather were entitled to the residuary estate, notwithstanding the judgment in Amherst *vs.* Ritch.

In February, 1899, Reynolds, as executor of Mrs. Fayerweather, filed his cross bill, in which he attacks the decree of the Surrogate's Court admitting the will and codicils of Mr. Fayerweather to probate, the judgment of the Supreme Court in Amherst *vs.* Ritch, and seeks to have probated another and earlier will of Mr. Fayerweather as his last will and testament, and also by judgment to have the residuary estate given to said Reynolds, as executor, and the next of kin.

To the bill of complaint and the cross bill Bulkley, Ritch and Vaughan, as executors, &c., and the twenty colleges above named filed special pleas setting up the judgment in Amherst *vs.* Ritch as a bar.

A large amount of testimony has been taken. The record is a voluminous one; the issue an extremely narrow one. Upon final hearing the pleas of the defendants were sustained, and bill and cross-bill dismissed upon the ground that the judgment in Amherst *vs.* Ritch was conclusive against the complainants and a bar. The plaintiffs did not appeal to the Circuit Court of Appeals, but have appealed directly to this Court.

It will be seen from the above statement that the estate of Mr. Fayerweather has been involved in litigation from the time his will and codicils were propounded for probate in November, 1890. Such litigation has prevented final settlement of his estate and final distribution among the colleges above

named, in whose favor the judgment of the Supreme Court was entered. Bulkley, Ritch and Vaughan, as executors of his estate, are menaced by the claims of Mrs. Fayerweather's executors and the next of kin.

It is now nearly fourteen years since Mr. Fayerweather died. The twenty colleges aboved named are anxious to receive their share of the residuary estate at the earliest possible moment. Ritch, Bulkley and Vaughan are anxious to have a final settlement of the trust estate and be relieved from the responsibility and reflection which might be made against them for not closing the estate of the testator before. It is important, in view of the large amount of money involved and the diversity of interest, that there should be an end of litigation as soon as possible.

We submit that the case is a proper one for the Court, in the exercise of its discretion, to grant a preference and advance the cause upon the calendar.

We respectfully submit that the motion should be granted, and the cause assigned for argument in October, 1904.

JOHN E. PARSONS,
Counsel for Justus L. Bulkley and Henry B. Vaughan, individually and as Executors of the Last Will and Testament of Daniel B. Fayerweather, deceased,
52 William Street,
New York.

C. N. BOVEE, Jr.,
Counsel for Thomas G. Ritch, individually and as Executor of the Last Will and Testament of Daniel B. Fayerweather, deceased,
18 Wall Street,
New York.

[M9615]